No. 96-729 (3)

Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ANITA L. BOWDEN

Petitioner,

v.

PUBLIC BUILDING COMMISSION OF CHICAGO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ILLINOIS APPELLATE COURT,
FIRST DISTRICT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

ANITA H. BOWDEN
55 WEST CHESTNUT STREET
CHICAGO, IL 60610
(312) 642-6045

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I.

This Case Is Properly Before The United States Supreme Court Pursuant to U.S. Supreme Court Rule 10 1

II.

Petitioner Does Not Present New Issues on Appeal Which Were Not Presented to the Appellate Court 5

III.

The Illinois Appellate Court Should Have Been Required to Pass on the Issue of the Trial Court's Determination Under the Discovery Rule 6

CONCLUSION 8

APPENDIX

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Hamilton v. Smith, 773 F 2d, 461, 467, (2nd Cir. 1985) 4
McKnight v. N.M. Paterson & Sons, Ltd., D.C. Ohio 1960, 181 F Supp. 434 affirmed 286 F 2d, 250 3
Meadows v. Union Carbide Corp., 710 F Supp. 1163 (N.D. Ill. 1989) 4
Page v. United States, 729 F 2d, 818, 823 (D.C. Cir. 1984) . . . 4
Quiming v. International Pacific Enterprises Ltd., D. Hawaii 1990, 773 F Supp. 230 3
Shore v. Parklane Hosiery Co. Inc. C.A.N.Y. 1977, 565, F 2d, 815 3
Whitaker v. Coleman (CCA 5th, 1940) 115 F 2d, 305 3

APPELLATE COURT AND OTHER CASES

City of Rock Falls v. Chicago Title & Trust Co., 13 Ill. App. 3d, 359, 300 N.E. 2d, 331 (3rd Dist. 1972) 4

STATUTES

28 U.S.C.A. - Rule 56 3

I.

THIS CASE IS PROPERLY BEFORE THE UNITED STATES SUPREME COURT PURSUANT TO U.S. SUPREME COURT RULE 10

The trial court improperly granted summary judgment to the Defendant due to insufficient evidence. Summary judgment was inappropriate and in violation of the original federal law, use and intent. The Illinois Appellate and Illinois Supreme Courts affirmed the trial court's decision.

Plaintiff/Petitioner was denied adequate, complete, fair, full, meaningful and timely access to the court under the First Amendment to the Constitution of the United States, and made applicable to the State of Illinois by the Fourteenth Amendment of the U.S. Constitution; denied trial by jury pursuant to the Seventh Amendment of the U.S. Constitution; denied due process of law; and deprived of life and liberty without due process of law under the Fifth Amendment.

Only when no genuine issue of material fact exists, court may, without violating U.S.C.A. Amendment 7 rights, grant summary judgment.

It is the prerogative of the U.S. Supreme Court to determine if this case is properly before it and if the petition does or does not present important federal questions or conflict between the Illinois Appellate opinion and that of other courts.

Even though Plaintiff's attorney included incorrect and incomplete information and did not present her case in the most efficient, professional and clear way, the correct information can be found in the deposition records, which could have been deciphered with little effort. Plaintiff admits she did not catch mistakes in the Plaintiff's Response to the Defendant's Motion for Summary Judgment

and was not allowed to review the 1994 Appellate brief before her first attorney submitted it.

The Illinois courts ignored or misinterpreted the correct information and assumed wrong information. No new information or argument was presented to the Illinois Appellate Court which could not be found in the records.

If the attorneys and judges failed to submit all important deposition pages and reports into the main records that could have clarified confusing information and made Plaintiff's case go more effectively and more quickly, then Plaintiff was surely discriminated against. The Defendant's Motion for Summary Judgment was based on answers confined to questions of liability to the Plaintiff and did not address questions allowing defense, elaboration or explanation by Plaintiff.

The complete 9/12/91 accident, 4/16/92 doctor's report, Motion to Correct Record on Appeal, Appellate Record pages R66/91/144, Defendant's Appellate Brief pages 125/272/323/515/516/561 and Deposition Transcript pages 177/180/297/298/334/534/536/537 taken by Patricia G. Talomo Court Reporters, 79 West Monroe Street, Suite 1219, Chicago, Illinois 60603 should have all been included in the main records given to Appellate Court. Some of these reports/pages are listed in the Appendix attached hereto.

It is untrue that the Petition attempts to ask this Court to reinterpret the facts of this case under a new position or theory being presented for the first time at this level of appeal.

It is untrue Plaintiff attempted to recreate her argument in her Petition to the Illinois Supreme Court by arguing for the first time that the "discovery rule" was now applicable in favor of the Plaintiff and that the trial court misinterpreted the facts.

It is untrue Plaintiff admits in paragraphs 2 and 3 of her statement of the case that she is presenting new arguments not

presented to the lower courts. All complete and correct information can be found in the deposition records, doctors' and accident reports, briefs, and Plaintiff's Response to Defendant's Motion for Summary Judgment.

In resolving Defendant's Motion for Summary Judgment, facts must be assumed that are most favorable to Plaintiff. McKnight v. N.M. Paterson & Sons, Ltd., D.C. Ohio 1960, 181 F Supp. 434 affirmed 286 F.2d 250.

Where no genuine issue of material fact exists, the court may, without violating U.S.C.A. Amendment 7 rights, grant summary judgment. Shore v. Parklane Hosiery Co. Inc., C.A.N.Y. 1977, 565, F.2d 815.

When direct evidence produced by party moving for summary judgment conflicts with that produced by nonmoving party, the judge must assume truth of evidence set forth by nonmoving party with respect to that fact. Quiming v. International Pacific Enterprises Ltd., D. Hawaii 1990, 773 F. Supp. 230.

The provisions of U.S.C.A. Rule 56 were well summarized soon after its original adoption in Whitaker v. Coleman (CCA 5th, 1940), 115 F.2d 305 when in this case it was pointed out that summary judgment is not designed to deprive the parties of a trial if any genuine issue of fact exists.

In Plaintiff/Appellant's brief to the Illinois Appellate Court, her first attorney did argue that the Continuous Tort Doctrine should be applied to this case.

Defendants argued that the Continuous Tort Doctrine only applies to trespass and nuisance actions and should not and has not been applied to negligence or other types of tortious conduct. Defendants cited cases in support of limiting the application of this doctrine to trespass actions.

Plaintiff's first attorney pointed out that there is other case law

to the contrary which closely parallels the facts in the case at bar, Meadows v. Union Carbide Corp., 710 F. Supp. 1163 (N.D. Ill. 1989). Here Meadows was exposed to toxic chemicals at work from 1980-85. He filed a lawsuit 8/14/86. Union Carbide argued the "discovery rule" barred Plaintiff's suit because he knew in 1980 that the chemicals caused his injuries. The court held that the discovery rule did not apply to this case when the Defendant's negligence is continuing in nature and that the Statute of Limitations would not begin to run until the date of the last exposure.

City of Rock Falls v. Chicago Title & Trust Co., 13 Ill. App. 3d 359, 300 N.E. 2d 331 (3rd Dist. 1972) and Meadows v. U.C. clearly establishes that Illinois has not limited the Continuing Tort Doctrine to trespass and nuisance actions.

Defendants also argued before the trial court that the date of accrual is the date that Plaintiff knew or had reason to know her injury was caused by Defendant's negligence. Plaintiff's first lawyer pointed out that the cases cited by the Defendants are inapplicable because they do not concern a continuing tort. In virtually all cases cited by Defendant, the alleged tortious conduct ceased more than two (2) years before the lawsuit was filed.

The only case cited by Defendant which specifically discussed the application of the continuing tort was Hertel v. Sullivan. In Hertel, the court was reluctant to apply the Continuing Tort Doctrine because it was not aware of any other cases applying this theory beyond trespass and nuisance.

As noted, there are cases applying this doctrine to negligence and other types of tort actions. Also see: Hamilton v. Smith, 773 F 2d, 461, 467 (2d Cir. 1985), Page v. United States, 729 F 2d 818, 823 (D.C. Cir. 1984).

Plaintiff's first attorney stated that Plaintiff's knowledge under the "discovery theory" as espoused by Defendant, is irrelevant when

Defendant's conduct is continuous or recurring.

II.

PETITIONER DID NOT PRESENT NEW ISSUES ON APPEAL WHICH WERE NOT PRESENTED TO THE APPELLATE COURT

In the trial court, Plaintiff's first attorney argued a "continuing tort" theory while simultaneously evoking the "discovery rule". The continuing tort and discovery rule were argued simultaneously but Plaintiff's attorney emphasized the continuing tort theory since Plaintiff was exposed to specific chemical fumes as listed in Dr. A. Greene's 4/16/92 doctor's report and 9/12/91 accident report from 1972 to 1986, one day on 9/12/91 and from 9/93 to mid-December 1993. Plaintiff's first attorney mistakenly said Plaintiff was exposed to these fumes from 1972 through December 1993. He minimized discovery rule but did not completely reject it.

Plaintiff's subsequent attorneys emphasized the discovery rule when each submitted the Petition for Rehearing to the Illinois Appellate Court and the Petition for Leave to Appeal to the Illinois Supreme Court.

Even if the Plaintiff's attorney did argue the "continuing tort" theory, which the trial court rejected, the trial, Appellate and Supreme Courts should not have granted summary judgment to the Defendant if there was insufficient evidence to grant it properly and honestly.

III.

THE ILLINOIS APPELLATE COURT SHOULD HAVE BEEN REQUIRED TO PASS ON THE ISSUE OF THE TRIAL COURT'S DETERMINATION UNDER THE DISCOVERY RULE

The facts were disputed and thus the Illinois Appellate Court should have attempted to pass on the issue of the trial court's determination under the discovery rule.

The court misconstrued the evidence before it. Plaintiff does dispute when she should have reasonably known of her injuries or reasonably should have known that the injury was wrongfully caused by Defendant. In Plaintiff's Response to the Defendant's Motion for Summary Judgment, Plaintiff states:

> "Nevertheless, the Plaintiff did not know until April 16, 1992 that she had permanent lung damage as a direct result of her exposure to the air in Defendant's building. This information was provided by her doctor, Andrew Greene, M.D. (See Affidavit of Bowden.) Moreover, Plaintiff did not know, nor should she have known, that she suffered from brain dysfunction until after she filed her complaint." (See Record, pg. 144.)

It is true, as the court's Order points out, that Plaintiff argued that when a repeated and continuing tort occurs, the cause of action does not accrue until the wrongful conduct ceases. The court disagreed with this argument and ruled against her. However, it is evident in the record that Plaintiff, while discussing the continuing tort theory, also contended that she did not actually discover or have reasonable knowledge that she had been seriously injured until April 16, 1992. Although inartfully pleaded, Plaintiff did, in effect, evoke the "discovery rule" by stating that she did not have reasonable

knowledge of her injuries until that point of "discovery". By ruling only on the basis of the "continuing tort" argument, the courts failed to recognize that a material fact affecting the application of the "discovery rule" was, in fact, at issue.

In brief, while rejecting Plaintiff's "continuing tort" theory, the courts failed to rule on Plaintiff's "discovery rule" theory. This Court should now reconsider the Appellate and trial courts' prior ruling and turn its attention to the date of discovery.

The Illinois Appellate Court's opinion concentrates on the "continuing tort" argument. It only mentions in passing that Plaintiff does not dispute that she knew that Defendant had wrongfully caused her injuries for more than two years before filing her complaint. Not saying any more than this, lacking further elaboration, it is evident that the Appellate Court has given full weight to the Appellee's interpretation of the facts.

In paragraph 2, page 5 of Plaintiff/Appellant's brief to the Illinois Appellate Court, it states that on 4/16/92 Dr. Andrew Greene, Jr. informed Plaintiff that this continued exposure caused permanent damage to her lungs. C. 145-48. In the last paragraph of page 15, it states it is important to note that Plaintiff did not know, nor should she have known, that she suffered from brain dysfunction until after she filed her complaint. C. 145-48.

Dr. H. Stevenson, who had been Plaintiff's doctor since approximately 1985, referred her to Dr. Greene, a lung specialist, in late 1991 after her 9/12/91 exposure to fumes. Dr. Greene wrote a letter to Dr. Stevenson dated 4/16/92 advising him that specific chemicals at work caused damage to her lungs. If Dr. Stevenson had told Plaintiff in earlier years that chemicals at work had caused her any lung problems, it does not seem logical that in 1991 it would have been necessary for Dr. Greene to send Dr. Stevenson that 4/16/92 report/letter informing him of such.

Dr. Greene also stated that Plaintiff's reexposure to these chemicals on 9/12/91 irritated and aggravated her lung condition. When Plaintiff worked in the biochemistry lab from 1986 to 9/93, except one day on 9/12/91, she did not think she was still exposed to those same chemicals emanating from the hematology/clinical chemistry/lead lab.

Plaintiff was told by an authority of her employer that he had no reason to believe that if she has a health condition it is work related.

In the Appellate Court Order it states that Plaintiff said that she had been a good employee for not suing her employer. Plaintiff mentioned cancer but never argued that she had contracted it or that her employer had caused it.

Plaintiff did get glass in her eye from a centrifuge at work, fell out of a broken chair at work and barely escaped Defendant's ceiling which fell on chair where Plaintiff had recently sat. Plaintiff did not take any legal action against her employer or Defendant, her employer's landlord.

CONCLUSION

Therefore, Petitioner, ANITA BOWDEN, respectfully requests that her Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Anita H. Bowden
55 West Chestnut Street
Chicago, IL 60610
(312) 642-6045

APPENDIX 1

Andrew B. Greene, Jr., M.D.
1940 E. 87th Street - Suite 13
Chicago, Illinois 60617

Telephone: (312) 734-1577

April 16, 1992

Dr. Howley Stevenson
1807 West 95th Street
Chicago, Illinois 60643

Dear Dr. Stevenson:

Thank you for referring Ms. Anita Bowden to me for her respiratory problems. Ms. Bowden gives a history of working for the Chicago Health Department as a chemist to the chemistry labs in the second basement of the Daley Center for the last 19 years. She gives a history of having respiratory and other problems due to the overall air quality and toxic chemical's in the basement.

Ms. Bowden further relates that for the first thirteen years, she worked with or around such chemicals as Methyl Isobutyl Ketone, Ammonium Pyrolidine Dithocarbamate, Trichloroacetic Acid, Sodium Hydroxide and Mercury, as well as other chemicals in her work environment. Data on these chemicals indicate that they are irritating and harmful to the airway and other parts of the body. Six years ago, she was transferred to another chemistry lab located in the second basement of the Daley Center.

However, on September 12, 1991 she was reassigned to her original lab area. She experienced on acute exacerbation of shortness of breath and had to be rushed to the emergency room of Northwestern Hospital. She also admitted to having chest tightnss, nausea, palpitations and weakness at that time. She further states that since that time she has not recovered back to her usual state of health, although she felt better since being assigned away from this area.

Ms. Bowden has had several visits to the office and her physical examinations have been remarkable for decreased air flow on auscultation of the lungs without wheezing rhonchi or rales. She has had a number of laboratory tests prior to and after her acute illness of Sept. 12, 1991. I have had the opportunity to review the tests you forwarded to me as well as additional tests. Ms. Bowden's recent chest x-ray is essentially normal. The x-ray report from Columbus Hospital done in 1985 stated several small calcifications from past inflammatory disease exist. Her pulmonary function tests show a persistent restrictive defect since 1985. Pulmonary function tests were performed on Sept. 27, 1991 by her employer's doctors. Their records show an improvement in the Oct. 17, 1991 study.

A Gallium Scan of the lungs, which was performed at Northwestern Hospital showed a mild uptake in the left peripheral area and showed that Sarcoidosis could not be ruled out. She was offered a Bronchoscopy and Transbronchial Lung Biopsy, but declined to have the procedure done because of her fear of easy susceptibility to infections, religious reasons and other grounds. Based on her past and present medical and work history, I feel the above mentioned chemicals she has worked with and around for thirteen years caused permanent damage to her lungs. Her reexposure to these chemicals on Sept. 12, 1991, irritated and aggravated her lung condition. In any

event, her underlying chronic lung condition is worsened when exposed to an irritating environment.

I recommend that the patient not return to the areas where the above described chemicals are used. She should infact avoid environments where poor air quality exist and it is recommended that she work in well ventilated areas.

If you have any further questions, please feel free to call.

Sincerely,
s/Andrew B. Greene, Jr., M.D.
Andrew B. Greene, Jr., M.D.
Pulmonary Medicine